Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-384 OF 1995
MAHADEV SHANKAR, ABU MANSOR AND DENIS ONG JJCA
5 MARCH 1997

Civil Procedure *— Judgments and orders — Consent order — Variation — Both counsel agreed that issue be decided as a preliminary point, resulting in consent order made — Whether court should permit one party to resile from what was decided by his counsel — Whether trial judge could reopen matter because no order had been perfected — Whether such curative powers can only be exercised under the slip rule — Whether order could be varied*

The appellant ('Visia'), previously known as Sim Lim Finance (M) Bhd, entered into two master agreements with the first respondent ('the dealer') for a credit facility. By way of security for the due performance of the dealer's obligations under both agreements, the second and third respondents executed two written guarantees. However, differences arose between the parties and a very large sum of money with interest thereon accrued due. The appellant began to press for repayment. Negotiations between both parties resulted in the credit facility under both agreements being terminated. Visia, not satisfied that the guarantees were enough for the amount then due, asked for additional security which the respondents executed by way of an alleged novation letter.

Visia filed a writ for the recovery of RM3,096,083.47. The defence argued that both the guarantees were void for uncertainty, and if not void, they were superseded by the alleged novation. At the date of the trial, both counsel agreed that the issue as to whether the guarantees were void for uncertainty be decided as a preliminary issue. The trial judge ruled that the guarantees were not void for uncertainty and the guarantor was liable to the plaintiff and that the only issue remaining to be disposed of was the quantum payable to Visia. A joint application was then made for time so that the claim could be settled. It could be inferred that the respondents had accepted liability and were now negotiating on quantum. However, the respondents' counsel subsequently submitted that only the issue of the validity of the guarantees had been decided but not the novation and that the respondents should therefore be permitted to call evidence on the novation, which the trial judge allowed. Visia appealed against this ruling.

Held, allowing the appeal:

Both counsel in this case had consented to proceed in a particular way. An order made by consent in the absence of fraud can only be varied by consent. It would be a denial of justice to permit a party to resile from what his counsel decided for him merely because he lost.

As to the trial judge's view that he could reopen the matter because no order had been perfected, it is clear that these curative powers can only be exercised under the slip rule if it can be clearly shown that the unextracted order was wrongly worded and in some way did not truly represent what was actually decided. Therefore, it followed that the only issue left for the court below was to determine how much money was due from the respondents to the plaintiff. The trial judge could not allow the respondents to call witnesses on the issue of novation.

Also, the novation point was taken in the court below to neutralize the guarantees. However, it has been demonstrated that the letter was merely to provide additional security and not to neutralize the guarantees. As such, the guarantees should continue in full force (see p 712A–D); *Doyle v Olby (Ironmongers) Ltd & Ors* [1969] 2 QB 158 distinguished.

[Bahasa Malaysia summary

Perayu ('Visia'), dahulunya dikenali sebagai Sim Lim Finance (M) Bhd, telah mengikat dua perjanjian induk dengan penentang pertama ('peniaga tersebut') untuk kemudahan kredit. Sebagai cagaran untuk pelaksanaan obligasi peniaga tersebut di bawah kedua-dua perjanjian, penentang kedua dan ketiga telah melaksanakan dua gerenti bertulis. Namun demikian, perbezaan telah menimbul di antara pihak-pihak dan sejumlah besar wang dengan faedah di atasnya terakru. Perayu mula menggesa supaya bayaran balik dibuat. Perundingan di antara kedua-dua pihak mengakibatkan kemudahan kredit di bawah kedua-dua perjanjian diberhentikan. Visia, yang tidak puas hati bahawa gerenti-gerenti adalah mencukupi bagi amaun yang harus dibayar, meminta cagaran tambahan yang kemudiannya dilaksanakan oleh penentang-penentang melalui surat novasi yang dikatakan.

Visia memfailkan satu writ untuk mendapat balik RM3,096,083.47. Pihak pembelaan menghujahkan bahawa kedua-dua gerenti adalah terbatal disebabkan ketidakpastian, dan jika tidak terbatal, mereka telah diganti dengan novasi yang dikatakan. Pada tarikh perbicaraan, kedua peguam bersetuju bahawa isu mengenai sama ada gerenti-gerenti adalah terbatal untuk ketidakpastian diputuskan sebgaai isu permulaan. Hakim perbicaraan memutuskan bahawa gerenti-gerenti tidak terbatal disebabkan ketidakpastian dan penggerenti bertanggungan kepada plaintif dan bahawa satu-satunya isu yang tinggal untuk diselesaikan adalah kuantum yang harus dibayar kepada Visia. Suatu permohonan bersama kemudiannya telah dibuat untuk masa supaya tuntutan boleh diselesaikan. Ia boleh disimpulkan bahawa penentang-penentang telah menerima liabiliti dan kini berunding atas kuantum. Walau bagaimanapun, peguam penentang-penentang kemudiannya menghujahkan bahawa cuma isu kesahan gerenti-gerenti telah diputuskan tetapi bukan novasi dan bahawa penentang-penentang seharusnya dibenarkan memanggil keterangan

atas novasi, yang dibenarkan oleh hakim perbicaraan. Visia merayu terhadap keputusan ini.

Diputuskan, membenarkan rayuan:

Kedua-dua peguam dalam kes ini telah bersetuju untuk meneruskan dalam cara tertentu. Satu perintah yang dibuat dengan persetujuan dalam ketiadaan fraud hanya boleh diubah dengan keizinan. Ia akan merupakan penafian keadilan untuk membenarkan suatu pihak untuk berpaling daripada apa yang diputuskan oleh peguam untuknya semata-mata kerana dia telah tewas.

Berhubung dengan hemat hakim perbicaraan bahawa beliau boleh membuka semula perkara itu kerana tiada perintah telah disempurnakan, adalah nyata bahawa kuasa-kuasa pemulihan ini hanya boleh digunakan di bawah kaedah khilaf sekiranya ia boleh ditunjukkan dengan jelas bahawa perintah yang belum diekstrakkan telah menggunakan perkataan yang salah dan dalam mana-mana suatu keadaan tidak mewakili apa yang sebenarnya diputuskan. Maka, ini bermakna bahawa satu-satunya isu yang tinggal untuk mahkamah bawah adalah untuk menentukan berapa banyakkah wang yang harus dibayar oleh penentang-penentang kepada plaintif. Hakim perbicaraan tidak boleh membenarkan penentang-penentang memanggil saksi-saksi atas isu novasi.

Juga, hujah novasi telah diambil di mahkamah bawah untuk menjadikan gerenti-gerenti tidak berkesan. Walau bagaimanapun, ia telah ditunjukkan bahawa surat tersebut adalah cuma untuk menyediakan cagaran tambahan dan bukan untuk menjadikan gerenti-gerenti tidak berkesan. Oleh itu, gerenti-gerenti harus diteruskan sepenuhnya (lihat ms 712A–D); *Doyle v Olby (Ironmongers) Ltd & Ors* [1969] 2 QB 158 dibeza.]

Notes

For cases on consent order, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2036–2038.

Cases referred to

Chua Wah Keow v Ng Ho Huat & Anor [1961] MLJ 321 (refd)
Doyle v Olby [1969] 2 QB 158 (distd)
Lim Kar Bee v Abdul Latif bin Ismail [1978] 1 MLJ 109 (refd)

Legislation referred to

Rules of the High Court 1980 O 14

Appeal from: Civil Suit No D2–220–1032 of 1990 (High Court, Kuala Lumpur)

Ajit Kumar Hastir (*Choo & Co*) for the appellant. A
Fiona Bodipalar (*Sri Ram & Co*) for the respondents.

Mahadev Shankar JCA (delivering judgment of the court): Our decision to allow this appeal was unanimous. Our reasons now follow.

The appellant ('Visia') was previously known as Sim Lim Finance (M) B Bhd ('Sim Lim'). For all practical purposes, they are the same legal entity because Visia were the successors in title to Sim Lim and inherited all its rights and liabilities.

On 10 October 1981, Sim Lim entered into a master agreement with the first respondent ('the dealer') for a credit facility of RM4m. We refer C to this agreement hereafter as 'the first master agreement'. It was a very comprehensive agreement. The dealer traded in motor vehicles. It did so on hire-purchase terms. Whenever it found a customer, hire-purchase documents would be executed. These would provide that the ownership of the vehicle was vested in Sim Lim and the vehicle would be registered accordingly with the Registrar and Inspector of Motor Vehicles ('RIMV'). D Thereupon, the dealer would collect the full agreed market value of the vehicle from Sim Lim. Possession of the vehicle would move from the dealer to the hirer. Notional delivery of the vehicle would be by way of the handing over by the dealer to Sim Lim of the registration book, which would have Sim Lim's claim endorsed thereon. The dealer's repayment of E this sum and all the interest accruing over the duration of the hire-purchase agreement was to be effected by the dealer collecting the payments made by the hirer and remitting the same to Sim Lim.

As can readily be appreciated, Sim Lim was taking the greatest risk. It was putting the money required for the capital acquisition up-front to the F dealer. In exchange, it got the pieces of paper giving title to the vehicle and another piece of paper from the dealer undertaking to collect the moneys periodically from the hirer who had possession of the vehicle.

By way of security for the due performance of the dealer's obligations of the first master agreement, the second and third respondents executed a written guarantee at the same time. So it is also dated 10 October 1981 G ('the first guarantee'). The consideration stated was Sim Lim's entering into the first master agreement.

On 1 June 1982, Sim Lim entered into a second master agreement with the dealer ('the second master agreement'). It is in the same terms as the first master agreement. (The transactions were to be maintained under H a second account for a credit facility of RM800,000.) Again a similar guarantee was contemporaneously executed by the second and third respondents.

A high degree of fidelity was required from the dealer if Sim Lim was to get its money back. The dealer had to, first of all, ensure that the hire- I purchase transactions were genuine and not phantom paper transactions. The moneys payable had to be diligently collected and remitted. Repossession in the case of defaulters had to be energetically carried out. For one reason or another, differences arose between the parties and a very large sum of money with interest thereon accrued due.

By 1987, Sim Lim's name had already changed to Visia, and the parties dealt with each other using Visia's name. In other words, the respondents had accepted Visia as the assignee and successor in title of Sim Lim. Visia began to press for repayment. There were negotiations.

These negotiations terminated in a letter dated 24 July 1987. The letter was signed by the second respondent only. He confirmed that effective from 1 August 1987, the credit facility under both the first and second agreements would be terminated. The rest of the letter deals with the new arrangements for the collection and remittance of outstanding amount on existing hire-purchase agreements. Obviously Visia was not satisfied that the first and second guarantees were enough for the amount then due. So they asked for additional security. The respondents agreed. Clause 4(a) of the letter reads:

> As additional securities for the agency facilities from your company, two (2) terrace houses worth RM150,000 each and a piece of land (one acre) in Kuala Ibai industrial area (all of them in Terengganu) worth RM300,000 will be charged to your company. The amount to be charged shall be determined by your company.

The respondents' solicitors refer to this letter as the novation letter. We call it 'the alleged novation letter'.

Visia did not get satisfaction. It filed a writ on 5 July 1990 for the recovery of RM3,096,083.47. The respondents resisted. Visia applied unsuccessfully for summary judgment under O 14 of the Rules of the High Court 1980. The matter went to trial, with amended pleadings.

We are concerned here with para 5 of the defence. It stated that both the guarantees were void. It reads:

> In reply to para 11 of the amended statement of claim, the second defendant admits that the guarantee agreement dated 10 October 1981 was executed but avers that the second defendant is not liable under the said guarantee agreement. The second defendant further avers as follows:
>
> 5.1 that the guarantee is void for uncertainty and unenforceable. By the said guarantee agreement, the second defendant agreed to pay to the plaintiff by way of indemnity upon demand all sums that shall ultimately be due to the plaintiff by the first defendant in respect of goods or a motor vehicle supplied by the plaintiff to the first defendant. As the plaintiff neither supplied goods not supplied any motor vehicles to the first defendant, the said guarantees are of no effect.
>
> 5.2 as the master agreements have been novated and substituted by the second agreement, the guarantors are no longer liable (if at all) as the original agreement has been varied.
>
> 5.3 In any event the defendants contend and will contend that the guarantee agreement is unlawful, void and unenforceable being in contravention of the Banking and Financial Institution Act 1989.

Visia had filed an amended reply wherein all this was put in issue.

The trial came up before Richard Talalla J on 5 April 1994. Encik Rama Veloo who had appeared as counsel in the O 14 application appeared again as defence counsel. He asked for an adjournment to familiarize himself with the documents. It next came up for hearing on 17 May 1995.

Visia's counsel opened his case. The matter was then adjourned to 3pm. The notes of evidence (N/E) reads:

3.10 pm

Pihak seperti tadi.

Judge: By consent of both counsel, the issue raised in para 5.1 of the defence, namely that the guarantee is void for uncertainly be decided as a preliminary issue.

Dato' SF Wong: The plaintiff has joined issue on para 5.1 of the defence. See para 14 of the reply. Adjourned to 9 August 1994.

We emphasize this application was by consent of both counsel and the respondents had nearly one month to think about its implications.

The note for 9 August 1994 reads:

Judge: Counsel for both parties inform me that this morning they will be arguing solely on the issue under the guarantees between the plaintiff and the second and third defendants which issue is to be determined without evidence being led but simply on the submission of counsel on the pleadings and the plaintiff's bundle documents marked A.

R Veloo: Two master agreements which are in similar terms mutatis mutandis dated 10 October 1981 and 1 June 1982 in respect of scheduled and unscheduled goods respectively for approximately RM4m and RM800,000 respectively (PBD 2 para 3 of preamble, PBD 12 para 22 — PBD 27 guarantee — cl 91) of guarantee — 'all sums in respect of goods and motor vehicle supplied by you to him'.

'You' represents the plaintiff, 'him' represents the first defendant, the dealer. At no time did the plaintiff supply goods or motor vehicle to the dealer.

Letter at PBD 70 is a novation.

A Kumar: Bundle of pleadings 9BP — bp 44 para 5.1 — Guarantee void for uncertainty — PBD 70 does not assist.

R Veloo: I agree — refer to cl 5.1 of BP — refer to BP 5.2 novation.

A Kumar: Produce bundle of authorities (PBA) — PBA1, PB7, PBA 24 at p 27.

Judge: I rule that the guarantee is not void for uncertainty. While it is true it could have been more carefully drafted, its meaning considered against all the facts and circumstances relating to this case and the transaction between the plaintiff and the first defendant is clear and the guarantor is liable to the plaintiff under the guarantee. As to the amount in respect of which the guarantor is liable, there is in my view an issue to be tried, more particularly as to what transpired after the plaintiff terminated the master agreements by way of collection of dues from the hirers and the accounting of the commission all as raised in the counterclaim.

Adj to 26 September 1994.

Sgd

Richard Talalla

A So the alleged inherent voidness of the two guarantees, and if not void, their being superseded by the alleged novation were both argued. The order made by the judge makes it crystal clear that the only issue remaining to be disposed of was the quantum payable to Visia.

If the respondents were dissatisfied with this ruling, they should have
B appealed before 9 September 1994. They did not.

The matter was adjourned to 26 September 1994. It was not proceeded with on that day but adjourned to 9 November 1994.

On that day, respondents' counsel appeared. A joint application was made for time so that the claim could be settled. In its context, the only
C possible inference is that the respondents had accepted liability and were now negotiating on quantum.

It came up again on 21 March 1995. Again it was adjourned to 5 April 1995. On that day, Cik Fiona Bodipalar appeared for the respondents. Encik Rama Veloo also appeared but withdrew so that a change of solicitors
D form could be filed. The matter was adjourned to 16 May 1995.

That day, the respondents did an about-turn. Cik Bodipalar submitted that only the issue of the validity of the guarantees had been decided but not the novation and that the respondents should therefore be permitted to call evidence on the novation. Visia's counsel objected vehemently claiming issue estoppel.

E The judge's ruling reads as follows:

> The view I take is that there is no question of res judicata or issue estoppel. No order has been perfected. I am concerned that justice must not only be done. It must be seen to be done and I for one will not allow a litigant to depart from proceedings over which I preside with a feeling that he has not
> F been heard to completion of all his grievances. A fortiori in this case where the defendant has demonstrated obvious dissatisfaction with his previous legal advisers to the end that he has changed his solicitors and counsel. In the light of what counsel for the defendant has submitted, I consider that it would be draconian to prevent the defendant from calling witnesses on the issue of novation. I refer to the case of *Doyle v Olby (Ironmongers) Ltd & Ors*
> G [1969] 2 QB 158 at p 166 where it was stated by Lord Denning MR:
>
> > 'We never allow a client to suffer from the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side.'
>
> H This dictum was applied in *Lim Kar Bee v Abdul Latif bin Ismail* [1978] 1 MLJ 109 at p 115. (This dictum was applied in the dissenting judgment of Ong Hock Sim FJ.)

Against this Visia appealed. Unfortunately, the trial judge did not supply any written judgment so we are left with his notes.

I We regret we do not agree with the view he has taken. *Doyle v Olby (Ironmongers) Ltd & Ors* was a case where the erring counsel had appealed in due time. The trial judge was functus and the matter was being put right by the appellate court.

Here, both counsel had consented to proceed in a particular way. An order made by consent in the absence of fraud can only be varied by consent. It would be a denial of justice to permit a party to resile from what his counsel decided for him merely because he lost.

As to the trial judge's view that he could reopen the matter because no order had been perfected, we must make it clear that these curative powers can only be exercised under the slip rule if it can be clearly shown that the unextracted order was wrongly worded and in some way did not truly represent what was actually decided. Reference may be made to the cases cited by the appellant's counsel and in particular *Chua Wah Keow v Ng Ho Huat & Anor* [1961] MLJ 321 and *Lim Kar Bee v Abdul Latif bin Ismail* [1978] 1 MLJ 109.

It follows from what we have said that the only issue left for the court below was to determine how much money was due from the respondents to the plaintiff.

The novation point was taken in the court below to neutralize the guarantees. But as demonstrated above the letter was to provide additional security. It was, therefore, idle to suggest that the guarantees did not continue in full force.

Appeal allowed.

Reported by David Lai